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UNIVERSITY HIT WITH DAMAGES FOR USE OF ILLEGAL RECORDING

The use of what a court described as "strong-arm tactics" and an illegal recording during university disciplinary proceedings has resulted in an award of more than $140,000 in damages to a fraternity. As part of the award, punitive damages were levied against a university official personally. This extraordinary case tells a story of abuse of power, abuse that backfired and ended in an unprecedented award of damages.

Recording Leads to Fraternity's Suspension

In fall 2001, a former pledge of the Phi Delta Theta fraternity at the University of Iowa secretly planted a voice-activated recording device in the basement of the fraternity house. The former pledge later retrieved his device and took it to Philip Jones, the University's Vice President for Student Services, and claimed that the device had captured evidence of hazing activities and alcohol violations.

Fraternal Law Celebrates Our 100th Issue

The 1st issue of *Fraternal Law* was published in September, 1982. This is issue Number 100. The first story in issue Number 1, written by *Fraternal Law's* founder, the late Robert E. Manley, described the publication's purpose in the following way:

> Most legal problems of fraternities can be avoided. Almost every legal problem that develops for a fraternity is a "people problem" which has been allowed to get out of hand. Any interaction between individuals or groups has the potential for escalation to the level of a legal problem. A well-run fraternity that abides by the fraternal principles would not normally let this happen. The purpose of *Fraternal Law* is to discuss the numerous people problems that the fraternal organizations encounter to help the reader prevent those problems from evolving into legal problems.

The purpose of *Fraternal Law* has not changed over the years. We have consistently strived to present the most pressing legal issues concerning fraternities and sororities in an easy to read and informative manner. The most common topics that have appeared over the years are hazing (34 articles), alcohol (41), First Amendment (29), university relations (13), and economic issues, including taxes.

While the attorneys at Manley Burke have always published and written a great deal of the articles, many recurring and outside authors have made significant contributions to *Fraternal Law*. We would particularly like to acknowledge the contributions from Barbara Bromberg on economic and taxation issues (63 articles), James C. Harvey (12 articles) and Gregory Hauser (7 articles). Additional prominent authors, such as the Honorable Nathaniel R. Jones (the now retired judge from the United States Sixth Circuit of Appeals and the former General Counsel to the NAACP), Cecil Mackey (the former President of Michigan State University), and Representative Eleanor Holmes Norton (the current Congresswoman for the District of Columbia and the former chair of the Equal Employment Opportunity Commission) have also contributed articles to *Fraternal Law*. Numerous other authors have contributed articles and their expertise as well to make *Fraternal Law* the preeminent legal newsletter devoted exclusively to the legal issues affecting Greek organizations.

Fraternal Law is published by Manley Burke. Suggestions or articles for future publication are welcome at tburke@manleyburke.com

The fraternity's alumni investigated the claims, and had a number of discussions with the University aimed at resolving the matter informally. The alumni admitted that they had discovered an alcohol policy violation, but denied that any form of hazing had occurred and denied that the recording was authentic. Vice President Jones decided that the recording did show evidence of hazing; he proposed that the fraternity accept a one-year suspension of its recognition beginning the next academic term, conditioned on the fraternity giving up its right to a hearing. When the fraternity refused to waive the hearing, Vice President Jones immediately revoked the fraternity's recognition indefinitely. As a result, Phi Delta Theta could not participate in formal rush activities and intramural sports, or use campus facilities.

In February 2002, the fraternity requested an evidentiary hearing. More than a year passed while the parties negotiated a settlement that would allow the fraternity to regain its recognition. Just when it seemed that an agreement had been reached, Vice President Jones added the requirement that Phi Delta Theta admit to the original hazing charge. The fraternity refused, and negotiations collapsed.

An administrative hearing was finally held in August 2003. The illicit recording was the sole evidence against the fraternity, and despite no proof of authenticity, it was admitted over the fraternity's objections. The hearing officer found Phi Delta Theta guilty of hazing, based solely on the recording, and continued the indefinite suspension of the fraternity's recognition.

The fraternity appealed the decision through the University's administrative system. Early in that process, the fraternity's attorneys pointed out that Iowa law prohibits use of intercepted communications in any legal or administrative proceeding. And there are both civil and criminal penalties for such use: Iowa Code § 808B makes use of such a recording a Class D felony, and authorizes civil damages of not less than $100 per day, as well as punitive damages and attorneys' fees, against anyone who uses such a recording. In November 2003, on the advice of the University's counsel, Vice President Jones dismissed the hazing charge because the recording had been used illegally. However, Jones continued the indefinite suspension of recognition, now based solely on the admitted alcohol violation.

The case finally reached the desk of University President David Skorton. On June 29, 2004, President Skorton declared that there had been "sufficient passage of time to serve the interest of the university in the punishment of this organization." He did not address the claim that the suspension had been improper in the first place, or the use of illegally obtained evidence. President Skorton also conditioned the formal re-recognition of the fraternity on the approval of a number of documents and reports. Objecting to the "conditional" lifting of the suspension and seeking complete exoneration, Phi Delta Theta took its appeal up another level, to the Iowa Board of Regents. On July 29, 2004, a few days before the matter would have come before the Regents, President Skorton lifted the suspension unconditionally.

The Suspension Leads to Litigation

From the fraternity's point of view, the restoration of its recognized status did not end the matter. During the more than two years of the suspension, the fraternity's membership had declined by more than 50%, and its continued existence was in question. The chapter and its alumni house corporation had lost tens of thousands of dollars in dues and rental income. The chapter and its alumni had also incurred over $20,000 in attorneys' fees in fighting to regain the chapter's recognized status.

On February 4, 2005, the chapter and its alumni house corporation filed suit against the University and Vice President Jones in Iowa District Court.[1] The case was tried on September 6 and 7, 2006. Both sides presented testimony and documents, and the trial judge took the matter under submission.

The Court's Ruling

On January 24, 2007, the trial court ruled in favor of the fraternity.[2] In a detailed 17-page ruling, Judge Mitchell E. Turner found that the University and Vice President Jones expressly "used" the illegal recording against the chapter, in violation of Iowa law, by improperly suspending its recognition from November 19, 2001 to November 21, 2003. The court also found that even after the University dismissed the hazing charge on the advice of its attorneys, Vice President Jones continued to use the recording against the fraternity "by imposing disproportionately harsh sanctions under the pretext of a single alcohol violation" and this continued until President Skorton finally lifted the suspension on July 29, 2004. The court dismissed as "ludicrous" the University's claim that the latter period of suspension was not based on the illegal recording.

The court reserved its harshest words for Vice President Jones, calling portions of his trial testimony "not credible" and "disingenuous at best." The court found that Jones had used the initial indefinite suspension as a "strong-arm tactic" to discourage any appeal of his decision. The court held that Jones' "stubborn, obstinate, and willful conduct" in continuing to use the recording, even after he learned that such use was illegal, justified an award of punitive damages against him personally.

The court ordered the University and Jones to pay damages of $98,300 to the chapter (983 days at $100 per day), plus 7% pre-judgment interest. The court ordered the University and Jones to pay the chapter $24,444.18 for attorneys' fees it incurred in the administrative proceedings. The court also ordered Jones, individually, to pay $5,000 in punitive damages to the chapter, plus 7% pre-judgment interest. The chapter's attorneys will also be entitled to an additional

award of fees from the University and Jones for their handling of the lawsuit. The total damages awarded to the chapter are more than $141,000.

Unfortunately, the victory came too late to do the chapter any good: Just before the lawsuit came to trial, Phi Delta Theta's General Headquarters suspended its Iowa chapter's charter because of continued membership decline. Judge Turner found that the actions of the University and Vice President Jones were a significant cause in the decline and ultimate failure of the chapter.

The University has announced it will appeal the ruling.

• James C. Harvey

Mr. Harvey is an attorney in Orange County, California. He is a member of Phi Delta Theta and the NIC Legal Advocacy Committee.

1 *Phi Delta Theta House Assn. and Iowa Beta Chapter of Phi Delta Theta v. State of Iowa, et al.*, Iowa District Court (Johnson County) Case No. LACV-65500.

2 The court denied the claim of the alumni house corporation, holding that it was not directly damaged by the use of the illegal recording. The damages awarded were in favor of the undergraduate chapter only.

FIRE STUDY BLASTS USE OF SPEECH CODES

On December 6, 2006, the Foundation for Individual Rights in Education (FIRE) issued a scathing report criticizing American colleges and universities for their continued use of "speech codes." Their recent report, entitled "Spotlight on Speech Codes 2006: The State of Free Speech on our Nation's Campuses,"[1] surveyed 330 colleges and universities all across the United States looking at the regulation of speech on campuses.

FIRE, which has been an aggressive advocate of Freedom of Speech on college campuses, largely on behalf of conservative voices, identified numerous continuing examples of speech codes which limit the First Amendment rights of students. By examining publicly available material, FIRE put schools into four categories: Red Light, Yellow Light, Green Light and Not Rated. Red Light schools were those which had at least one regulation which clearly and substantially restricts Freedom of Speech on its face. A regulation against "offensive speech" was cited as an example of such a regulation since it had no limits, it was vague and failed to recognize that most offensive speech may not be regulated under the First Amendment. Yellow Light schools were those where FIRE determined that the regulation could infringe on the Freedom of Speech, depending on its application. A regulation against "verbal abuse," for example, would be appropriate if it was applied to prohibit fighting words or sexual abuse, but inappropriate if used to punish those who simply voiced a strong disagreement with the ideas of another. That might happen in any spirited political debate. Green Light schools were those where FIRE failed to identify any regulations that infringed upon Freedom of Speech.

FIRE acknowledged that certain private schools tell prospective students in advance that they may not expect to exercise all of their First Amendment freedom on the campus. Those schools were unrated.

Of the more than 300 schools examined, FIRE rated 229 as Red Light, 91 as Yellow and only 8 as Green.

It has long been recognized that private colleges have far greater latitude when it comes to regulating speech, than do public institutions. Public schools are "state actors" and may not deprive students of First Amendment or any other civil rights anchored in the Constitution. Private colleges, on the other hand, generally are not so restricted and, in the absence of making a contractual constitutional First Amendment commitment to its students, are not obligated to recognize Constitutional rights.[2] But amazingly, FIRE found in its study that private colleges did somewhat better in recognizing the Freedom of Speech rights of their students than did their public counterparts.

Seventy-three percent (73%) of the public colleges surveyed received Red Lights, while only fifty-eight percent (58%) of the private colleges did. In total, 104 private institutions were surveyed with 61 rated Red, 33 Yellow, 4 Green and 6, like BYU, Not Rated. Of the 230 public colleges in the survey, 167 were rated Red, 58 Yellow and 4 Green.

FIRE correctly recognized that even on public campuses, certain types of narrowly defined speech can be regulated. There is no Constitutional right to yell "fire" falsely in a crowded theater, or to use fighting words to entice reasonable people to immediate violence, or engage in libel, or obscenity, which itself is narrowly defined by Constitutional precedent. Similarly, actual harassment, normally engaged in over a long period of time, and most frequently seen in sexual abuse cases, can be regulated. But such exceptions are narrow and have been carefully regulated over the years by the courts.

Public colleges and universities have, on many occasions, been able to enforce speech codes which were vague and broadly over-regulated speech only because, in many instances, students and student organizations have failed to challenge such conduct in court. Where litigation has occurred designed to block disciplinary actions based on overly-broad speech codes, colleges and universities have almost always been found to have acted in an unconstitu-

tional manner and it has not been unusual to find that the mere filing of cases against state colleges and universities for such threatened disciplinary action has led to settlements which have included the withdrawal of the discipline.

FIRE's study and their efforts against limitations on First Amendment Freedom of Speech rights on college campuses are worth noting by the Greek world. The Freedom of Association rights upon which students are entitled to rely, at least on public college campuses, when they decide to associate with one another, in any particular organization, are based on the same Constitutional provisions upon which FIRE has relied to protect its clients.

Any successful effort to preserve student rights in one area aids future efforts to protect student rights in other related areas. Under the First Amendment, the Freedom of Speech and Freedom of Association go hand in hand.

Thus, it is in the interest of the Greek world to support efforts like those that FIRE has engaged in and to speak out against unconstitutional limits on the First Amendment rights of students. On private campuses, the argument may have to be phrased differently, but frequently, broad pronouncements of academic freedom and the promotion of free thought and debate can be found in many college publications and often in the speeches of college administrators. Appropriately calling attention to the hypocrisy of advocating such freedom of expression while prohibiting it by disciplinary regulation is an appropriate campus response.

His comments should be taken to heart by Greek organizations and others interested in protecting for students the panalopy of rights guaranteed by the First Amendment.

• Timothy M. Burke

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[1] The complete report is available on FIRE's web site: www.thefire.org.

[2] Some states, California for example, have their own laws protecting First Amendment rights.

DEAN ACQUITTED FOR FAILURE TO REPORT A FELONY

On February 9, 2007, a jury in Cleveland, Ohio acquitted the former Dean of Notre Dame College on two misdemeanor counts of failure to report a felony.[1]

As reported in the September 2006 issue of *Fraternal Law,* "Confidentiality vs. Legal Obligation," the Dean had been approached by two college women who each reported that they had been sexually assaulted by another student in separate incidents. Each of the women asked the Dean not to report the assaults. Subsequently, the same perpetrator assaulted four other women. That perpetrator now faces 21 felony charges, including rape and kidnapping. Ohio, like many other states, requires that someone who knows of a felony is obligated to report it to law enforcement. The Dean was charged for failing to do that in a timely fashion.

In a statement released to *Fraternal Law*, Bill Mason, the Cuyahoga County Prosecutor, said:

> "We are disappointed with the Jury's verdict. There is a reason why the law in Ohio requires all persons to report felony crimes to law enforcement authorities. Had these rapes been reported, there may not have been more attacks. We will continue to prosecute these types of cases in the future."

Obviously, it is natural to be concerned about the victim of an assault and to want to respond sympathetically to a request for confidentiality. The law, however, may require a different result and, as in the Cleveland case, if a crime goes unreported, the assailant may be free to strike again.

Texas' tough anti-hazing law is another example of it being a crime not to report a crime. Someone with firsthand knowledge of plans for a specific hazing incident, or firsthand knowledge of such an incident occurring, must report it to the Dean of Students or other appropriate College official. Failure to do so is a Class B Misdemeanor.[2]

• Timothy M. Burke

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[1] O.R.C. 2921.22

[2] Tex. Educ. Code Ann. §37.152 (2006)

ΣN RECEIVES SUBPOENA

Middle Tennessee State University has gone to court to obtain a subpoena which has been sent to the national offices of Sigma Nu Fraternity, Inc. The subpoena seeks information about alleged hazing at the Theta Iota Chapter at MTSU.

After a report on the Fraternity's hotline of alleged hazing, the Fraternity revoked the Chapter's charter. The MTSU Police Chief was quoted as saying that they were investigating the matter to determine whether or not criminal charges should be brought.

The subpoena was issued by a Rutherford County, Tennessee County Judge, but served on the Virginia-based Fraternity's National Office. That creates complications as to the validity of the subpoena in Virginia, where the Tennessee court has no jurisdiction.

• Timothy M. Burke

RESTRICTED FUNDS - SOMETIMES A DILEMMA FOR FRATERNITY FOUNDATIONS

INTRODUCTION

Because of the unique nature of fraternal foundations and the fact that many of their donors wish to establish named restricted funds that benefit a particular chapter or area of particular interest to the donor, and because historically, organizations did not work with the donor to craft restricted fund language that would withstand the test of time, many fraternal foundations find themselves in the position of having restricted funds containing large amounts of money that cannot be used because the donor had specified a particular use that no longer is possible (e.g., to benefit the educational purposes of a chapter that has been dissolved). This can be a very frustrating situation and, understandably, the foundations often wish to nullify or amend the restrictions on these funds and be able to use them for other charitable purposes of the organization. This article will discuss the legalities of taking this kind of action and suggest some remedial steps that can be taken to avoid this type of situation in the future.

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

While an organization that finds itself in the above situation would, through its board of directors, like to amend the terms of a restricted fund, that is usually problematic legally. In other words, simple action of the board of directors often will not suffice. This is because of a little known law called the Uniform Management of Institutional Funds Act ("Act"), which has been adopted in many states. While, like most Uniform Acts, model language has been suggested for the states to use in this connection, each state may add its own variations to the basic verbiage of the Act. In this article, we will focus upon and contrast two versions of the Act - Ohio and Indiana - because they are somewhat typical of other states in their approach to the subject.

In general, the Act provides that a restriction imposed by a donor on the use (or the investment) of such a fund may be released with the written consent of the donor. Obviously, this is a problem if the donor is deceased or unavailable, or in some cases where the contribution has been provided by a number of donors and the donor is therefore difficult to identify. The Ohio Act provides that if written consent of the donor cannot be obtained for these reasons, the organization may apply to the appropriate court for such release of the restrictions. In Ohio, the attorney general is a necessary party to the action and must be served with process in all proceedings pertaining to this kind of application - in fact, the Act provides that if this is not done, any judgment rendered in such proceedings will be void.

In the Ohio Act, in order to grant a release of restriction pursuant to the statute, the court must find that the restriction involved is "obsolete, inappropriate, impracticable or impossible," and then it may order the release of the restriction, in whole or in part. In other words, the Ohio Act requires a showing that at least one of these tests has been met. To give some examples, if a restricted fund provides that a scholarship is to be awarded in the field of engineering and the organization would prefer that the scholarship could be awarded generally, that would probably not be the type of restriction which an Ohio court would release, absent a showing that it has become impossible for the organization to award the scholarship because none of the possible awardees studies engineering. On the other hand, a restriction with respect to a fund that it may award scholarships only to a member of a certain chapter, where that chapter is no longer in existence, would seem to be an appropriate subject of release by an Ohio Court. In other words, it will be incumbent upon an organization seeking such a release in Ohio (and in other states that use this or a similar test), to make a showing that the release is obsolete, inappropriate, impracticable or impossible, as the case may be.

The Ohio Act, like many states' versions of the Act, does provide that a release by court order may not change an endowment fund to a fund that is not an endowment fund. Therefore, only the signature of the donor can accomplish this. Of course, the Act further provides that the fund may not be changed from a fund for a charitable or educational purpose to a non-charitable or non-educational purpose. The Act also provides that it does not limit the application of the doctrine of cy pres, which is an historic legal doctrine allowing a court to reform a charitable purpose under appropriate circumstances.

It is interesting to contrast the Indiana version of the Act with the Ohio version. While many of the provisions are similar, as one would expect since their genesis is the Uniform Act, the Indiana Act has an important variation and exception in that it does not apply to charitable organizations unless they have "an endowment fund with a fair market value of at least ten million dollars." Effectively, this would appear to allow smaller organizations the ability to deal with donor imposed restrictions through their boards of directors applying normal fiduciary principles. If the Indiana Act does apply, in addition to obtaining the written consent of the donor for a release, the Act provides that it also does not limit the application of the doctrine of cy pres or the ability of a board of an organization through legal or equitable proceedings to obtain a release of restriction. No test for such a release as is found in the Ohio Act as described above is provided in the Indiana Act.

PRACTICAL TIPS FOR DEALING WITH THIS SUBJECT

Having dealt with a number of organizations attempting to handle this type of situation in a cost effective and proper fiduciary manner, the following should be noted:

1. Note that the Act has no application to restrictions that are not imposed by donors - in other words, restrictions created by the board of an organization, commonly known as designated funds, can be released by the board through a resolution adopted in a manner which complies with applicable state law.

2. Since the cost of a court proceeding is not inexpensive, even under the best of conditions, every effort should be made to contact the donor in such a case to obtain his or her written consent to the requested change or release of restriction. In any event, the cost of such litigation must be weighed against the amount of the fund and the organization must decide, with the help of its counsel, at what financial point it is cost effective to embark on a court proceeding.

3. While this article has primarily dealt with restrictions on the charitable use of a fund, it should be kept in mind that the Act generally also provides for the release or change of a restriction on the investment of funds which has been imposed by a donor - such restrictions were common a generation or two ago and therefore are sometimes found with respect to such restricted funds.

4. Most fraternal foundations today will not accept a restricted fund unless it allows for some elasticity in the future in order to avoid these types of problems. For example, a typical provision in such a restricted fund would be: "If _____ chapter is closed, then the income from this fund may be used to provide scholarships to deserving members in good standing of _____ Fraternity who reside in the states of _____; however, if there are no such deserving applicants, then the income from this fund may be used to provide scholarships to members in good standing of _____ Fraternity."

5. Another measure that has been employed by some fraternity foundations, is to widen the group of donors, so that if the originally named donor is deceased, there are other individuals that can be regarded as donors for purposes of the Act and thus consent in writing to a release, in whole or in part, to the restriction if it becomes necessary. For example, the donors of a fund could be listed as the donor, his or her spouse, his or her children and even grandchildren if they exist.

CONCLUSION

While this article has of necessity been somewhat general, it should make fraternal foundations aware that any change of restrictions in a donor-restricted fund must be handled very carefully in order that the changes are accomplished legally and free from challenge. However, if the organization works closely with its counsel, in most cases, it should be able to change a restricted fund that is not fulfilling its charitable purpose, hopefully to one that is an active partner in the fraternal foundation's charitable and educational work. Finally, fraternal foundations should work with their counsel to make sure that their practices with regard to the intake of restricted funds and drafting of restricted fund language provide the maximum flexibility should the purposes of any such fund need to be changed in the future.

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MEMBERS SENTENCED TO 2 YEARS FOR HAZING IN FLORIDA

"They tortured my son." Army Master Sgt. Mark Jones told the judge, according to the Associated Press. "He wasn't hazed. He was tortured."

The first two fraternity members convicted under the new Florida hazing law each recently received two year prison terms. Michael Morton and Jason Harris, members of the Kappa Alpha Psi Chapter at Florida A & M University, were convicted of physically abusing a prospective member during an initiation ceremony. The victim, Marcus Jones, suffered a broken ear drum and was repeatedly beaten with a wood cane on his buttocks so severely that he ultimately required surgery for his injuries.

In the Associated Press article, Judge Kathleen Dekker explained the reason for the prison terms: "I want to save the victims who will quietly go along because they want to belong. I want schools to be furious and mad and upset that they can lose talent to this and come down hard on hazing."

The defendants attempted to argue that the victim was a willing participant because he could have withdrawn from the initiation at any time. However, under the Florida statute, like in most states now, the fact that the victim willing participated in the activity does not create a valid defense to criminal hazing charges.

- Daniel J. McCarthy

INSURANCE COVERAGE DENIED IN GEORGIA CASE

In April of 2003, members of the Lambda Chi Alpha Chapter at the University of Georgia took a potential pledge to several Athens, Georgia area bars to "entice him to become a member." One of the members, Travis Star, III, was below the legal age limit. Nonetheless, he illegally consumed alcohol and became drunk. Later that night, he stood up and fell out of the back of a moving pick-up truck being driven by a sober member of the Chapter. Star subsequently died from the head injuries he received.

A lawsuit followed some two years later. The Fraternity notified its insurance carrier, Liberty Corporate Capital, of the existence of the suit, but the insurance company ultimately filed its own declaratory judgment[1] action seeking to establish that there was no insurance coverage available because the Fraternity's policy specifically provides that "no duty to defend nor any insurance coverage afforded by this policy, shall apply to any claim arising out of or in any way resulting from any 'violation' of 'fraternity alcohol policy'." The Fraternity's Alcohol Policy specifically prohibited the consumption of alcohol in violation of State Law, either on chapter property "or at any environment or function given in the name of, or for the benefit of, Lambda Chi Alpha."

On February 13, 2007, the court found that Travis Star's own conduct, consuming alcohol illegally, violated Lambda Chi Alpha's alcohol policy and therefore the insurance company was not obligated to defend the Chapter. The court noted that requiring insurance coverage in such a case would "result in the subsidization of underage drinking, and would thus directly counter the rationale for adding the exclusion in the first place."

While this case grows out of the tragic consequences that may come from illegal and irresponsible consumption of alcohol, the decision in this case emphasizes the potential damage that can be done to a Chapter from such activity since, depending on the language of the applicable insurance policy, coverage may not be available to protect the Chapter from the financial consequences of such tragedies. The court did recognize in a concluding footnote that "the exclusion is expansive in scope, but in light of the fact that the parties bargained for this provision, the court cannot save the Chapter from the bad bargain."

• Timothy M. Burke

1 *Liberty Corporate Capital, Ltd., v. Nu Zeta Chapter of Lambda Chi Alpha Fraternity, et al.*, United States District Court, Middle District of Georgia, Athens Division, Case No. 3:05-CV-115(CAR).

JUDGE DENIES PRELIMINARY INJUNCTION MOTION

As previously reported in the November, 2006 issue of *Fraternal Law,* the Omicron Chapter of Sigma Chi, located in Carlisle, Pennsylvania and comprised of students attending Dickinson College, recently filed suit against the College.[1] The primary cause of action is for breach of contract because Dickinson, in its official publications, promises its students many of the same constitutional First Amendment rights that other citizens enjoy. The College also specifically informed its students that there would be no disciplinary consequences for joining an unrecognized fraternity. The College later abruptly changed its policy toward unrecognized fraternities by threatening to expel all students who either attempt to recruit students to an unrecognized fraternity or those who actually join such a fraternity.

The Plaintiffs filed a Motion for Preliminary Injunction seeking a court order to be able to continue to exist pending a full trial on the merits. The Plaintiffs alleged that the College acted in bad faith and unfairly singled out the Chapter when it attempted to change its policy on unrecognized fraternities. The Plaintiffs also alleged that the Chapter was a protected intimate and expressive association, and that Dickinson students had a contractual right to join the Chapter.

The Judge recently denied the preliminary injunction. In the decision, the judge held that the Plaintiffs did not demonstrate a clear right to relief as required for a preliminary injunction. The judge found that the College did not improperly modify the contract with its students, and specifically stated that "Pennsylvania courts have consistently afforded great deference to a private college's disciplinary policies and decisions." The Court concluded by stating that "[i]n light of the deference afforded to a private college's disciplinary policies and decisions, this Court refuses to read Dickinson's Student Handbook as contracting to provided unconditional First Amendment rights of association to student groups, especially in light of the express language to the contrary."

The Plaintiffs are now assessing their legal options and deciding the best course forward.

The Plaintiffs, including the Chapter, are represented by Tim Burke and Dan McCarthy from Manley Burke. Kevin Canavan, of the Swartz Campbell law firm in Philadelphia, serves as local co-counsel.

• Daniel J. McCarthy

1 *Joshua R. Erhardt, et al. v. Dickinson College,* Court of Common Pleas of the Commonwealth of Pennsylvania, Cumberland County, Case No. 06-2647.

CHARGES FILED IN TEXAS HAZING CASE

On December 10, 2005, 18-year old Phanta "Jack" Phoummarath died of alcohol poisoning following a party at the University of Texas' Lambda Phi Epsilon House. On December 13, 2006, following a year-long investigation, a Travis County Texas Grand Jury indicted three members of the fraternity for crimes relating to Phoummarath's death and the hazing of other new members of the Chapter.

The President of the Chapter was indicted on seven counts of hazing. The Pledge Captain was charged with seven counts of furnishing alcohol to a minor and 28 counts of hazing. The third member of the Fraternity was indicted on 14 counts of hazing. Under Texas law hazing that causes a death is a felony which is punishable by a jail term of six (6) months to two (2) years and a fine of up to $10,000. (Hazing which causes serious bodily injury is subject to up to one year in jail and a fine of up to $4,000. Hazing that does not cause serious bodily injury is punishable by a jail term of up to 180 days and a fine of up to $2,000.) The Travis County Prosecutor also announced that he would charge the fraternity itself with hazing and seek a fine of up to $10,000.

Lambda Phi Epsilon was described in *The Houston Chronicle* as not sanctioned as part of the University's official Greek system. Lambda Phi Epsilon is an Asian-American interest fraternity and is a member of The North American Interfraternity Conference (NIC). It was, however, a registered student organization. The University has suspended that status until 2011. WBLA-TV reported that Phoummarath died "after a heavy night of drinking in which fraternity members chanted for him and six other pledges to finish as many as 8 bottles of vodka, whiskey and other drinks being passed around. Phoummarath later passed out on a mattress in the house around 12:30 a.m. and vomited on a blanket." Recent reports indicate that while Phoummarath was passed out, members of the fraternity wrote numerous anti-gay epitaphs on his body, though published reports are that he was not gay. Phoummarath and at least one other fraternity pledge had also shaved their heads in what was described as being part of their "initiation."

In addition to the criminal charges, the fraternity also faces a civil lawsuit filed by Phoummarath's family by Houston attorney Randy Sorrels, who described the conduct engaged in by Chapter members as "disgusting and despicable behavior."

A Texas Alcoholic Beverage Commission official reported that Phoummarath's blood-alcohol level, based on a urine sample, was 0.50. In Texas, a blood-alcohol level of 0.08 means that an individual is too intoxicated to legally drive a motor vehicle.

In the summer of 2006, a Princeton Review Survey of 115,000 students voted the University of Texas the best party school in the United States.

It is extremely regrettable that hazing continues to haunt the Greek system. While national fraternities, the NIC, NPC and NPHC all have strong policies, educational programs and disciplinary procedures designed to eliminate hazing, some actives just refuse to heed the message. Their failures and misconduct discredit their Greek brothers and sisters and, most tragically, can cause the death of one of their own like Jack Phoummarath.

• Timothy M. Burke

2007 FRATERNAL LAW CONFERENCE

The 12th national FRATERNAL LAW CONFERENCE will take place November 16-17, 2007, at the Westin Hotel in downtown Cincinnati, Ohio. The full day session will begin at 9:00 a.m. on Friday and the half-day session on Saturday ends at noon.

Who should attend?

Fraternity officers, council members, administrators, students, school officials, attorneys and anyone involved with Greek organizations. We offer a substantial discount to students.

CLE credit is available from the State of Ohio and many other states. We are happy to cooperate in providing you or your state CLE Board with conference information.

The **general registration** fee is $350.00 per participant; **student fee** is $250.00. Included in the conference fee is a continental breakfast on Friday and Saturday, and a reception to be held Friday evening. Lunch will be on your own.

A block of rooms have been reserved at the Westin Hotel for $149.00 per night for a standard room. Conference Hotel room rates are subject to applicable taxes in effect at the time of check in (currently 10.5% occupancy Tax and 6.5% State and Local Taxes). Reservations must be made no later than October 27, 2007, to guarantee the group rate. Hotel reservations may be made by calling the Westin Hotel toll free at (800) 937-8461. Ask for the Fraternal Law Conference rates when making your reservation. For further information contact **Bonnie S. Hill** at (513) 721-5525.

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